FILED BY CLERK
OCT 23 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ELECTRICAL DISTRICT NO. THREE OF PINAL COUNTY, a political subdivision of the State of Arizona and an electrical district organized and existing under the laws of the State of Arizona, Plaintiff/Appellee, v. 3-F CONTRACTING INCORPORATED, an Arizona corporation, Defendant/Appellant.	2 CA-CV 2008-0051 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV 2006-00144

Honorable William J. O'Neil, Judge

REVERSED AND REMANDED

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E C K E R S T R O M, Presiding Judge.

¶1 Defendant/appellant 3-F Contracting Inc. appeals from the trial court's grant of a motion for partial summary judgment in favor of plaintiff/appellee Electrical District No. Three of Pinal County (hereinafter "District") on the issues of 3-F's liability for negligence and the resulting damages. The case arose from the collapse of a trench 3-F excavated, which damaged the District's electrical lines and equipment. On appeal, 3-F contends the trial court erred when it granted summary judgment because the District did not provide any evidence 3-F's actions breached its duty of care and because 3-F raised genuine issues of material fact on comparative fault and damages. We agree that issues of fact exist, and, therefore, we reverse the grant of summary judgment and remand the case to the trial court.

¶2 When reviewing the trial court's grant of summary judgment, we view the facts and the reasonable inferences that may be drawn therefrom in the light most favorable to 3-F, the party opposing summary judgment. *See Lowe v. Pima County*, 217 Ariz. 642, ¶ 3, 177 P.3d 1214, 1215 (App. 2008). The following facts are taken from the declaration of Paul Miller, the vice president of 3-F.

¶3 Sonoran Utilities hired 3-F, a contracting company specializing in excavating and grading, to install sewer lines for a new housing subdivision. Silver Fern, the developer of the subdivision, needed to connect the subdivision line to the main sewer line. Sonoran asked 3-F to do the "tie-in excavation" because it was "already on the job site with the equipment." A representative of Silver Fern directed 3-F where to dig for the tie-in. But 3-F did not find the tie-in when it excavated in that location. This ultimately resulted in 3-F digging a much larger trench than would have otherwise been necessary. Sandy Lake, a

supervisor for Sonoran, directed 3-F "where and how to dig" the larger trench and neither Silver Fern nor Sonoran advised 3-F that "there were hot power lines in the area" being excavated.

¶4 When 3-F encountered the District's lines, Lake directed 3-F to dig around them by hand. 3-F then "attempted to tie up the lines so they would not fall" and otherwise "followed all industry standards and specifications during the excavation, including shoring the area." The trench collapsed overnight, damaging the power lines. 3-F contended it had not expected it would rain overnight and that the rain might have been the cause of the collapse. The District contended it suffered over $100,000 in damages to its lines and equipment and demanded payment from 3-F and/or its insurer.

¶5 After 3-F and its insurer refused the District's requests for reimbursement, the District filed a complaint against 3-F and Silver Fern for negligence. The District later added Sonoran as a defendant. In its amended complaint, the District alleged that at the time of the cave-in, "3-F was working as a subcontractor for and on behalf of Silver Fern and/or Sonoran Utilities." After the parties had filed initial disclosure statements, the District moved for partial summary judgment against 3-F on the issues of liability and damages, contending the only issue of fact remaining in the case was whether Silver Fern or Sonoran had hired 3-F to excavate the trench. After a hearing, the trial court granted the District's motion in part, finding 3-F had been negligent.

¶6 While the court was still considering the District's motion against 3-F on the issue of damages, Silver Fern filed a motion for summary judgment, contending there had

been no evidence presented by the District or any codefendant—other than "the self-serving and unsubstantiated deposition testimony of Sonoran's ex-employee, Sandra Lake"—that showed it had made any agreement with 3-F to excavate the area. The District, 3-F, and Sonoran all opposed the motion.

¶7 Meanwhile, the court granted the District's motion for partial summary judgment against 3-F on the issue of damages. A few days later, it denied Silver Fern's motion for summary judgment, concluding that "[w]ho directed the actions of Defendant 3-F to excavate and cause the injury to Plaintiff is a genuine issue that could result in a verdict for either side of the issue." The court subsequently entered a final judgment against 3-F pursuant to Rule 54(b), Ariz. R. Civ. P., for $106,923.84—the amount of damages requested by the District. The judgment provided that the District was not precluded from pursuing its claims against Sonoran and Silver Fern, and that, if it was entitled to recover from those defendants, "that recovery is not affected by this judgment, except that Plaintiff shall not be entitled to a double recovery of that principal amount or of interest thereon." 3-F appealed the judgment, and the trial court stayed the proceedings as to the other defendants while this appeal is pending.

NEGLIGENCE

¶8 3-F argues the trial court erred in granting summary judgment against it on the issue of negligence when the District presented no evidence it had breached the standard of care in excavating the trench. We review de novo the grant of summary judgment, determining whether the party opposing the motion raised any genuine issues of material fact

and whether the trial court correctly applied the law. *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997).

¶9 A plaintiff must prove four elements to make a prima facie case of negligence: the defendant has a duty to conform to a particular standard of care; the defendant has breached that duty; the defendant's breach caused the plaintiff's injury; and, the plaintiff has suffered actual damages. *Gipson v. Kasey*, 214 Ariz. 141, ¶ 9, 150 P.3d 228, 230 (2007). The elements of breach and causation are generally fact questions for the trier of fact. *Id.* The court may only enter judgment as a matter of law on those issues when "reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶10 3-F does not dispute it owed a duty of care to the District. And although neither party has identified the specific duty applicable here, "'the duty [if it exists] is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk.'" *Coburn v. City of Tucson*, 143 Ariz. 50, 52, 691 P.2d 1078, 1080 (1984), *quoting* W. Prosser & W. Keeton, *The Law of Torts* § 53, at 356 (5th ed. 1984).[1] The existence of a duty, however, must not "be confused with details of the standard of conduct"

[1]Although not relied upon in this case, we note Arizona statutes provide an apparent basis for a specific duty regarding excavation near underground utilities. Sections 40-360.22(A) and 40-360.23(A), A.R.S., provide that excavations must be made in a "careful and prudent manner," including "taking measures for control of" the underground utilities in such a manner. "Careful and prudent manner" is defined as "conducting an excavation in such a way that when the excavation is less than or equal to twenty-four inches from an underground facility that is marked with stakes or paint or in some customary manner, the facility is carefully exposed with hand tools, and the uncovered facility is supported and protected." A.R.S. § 40-360.21(4).

required to satisfy the duty. *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 355, 706 P.2d 364, 367 (1985). Although duty remains constant, the conduct necessary to satisfy it depends upon the circumstances. *Beach v. City of Phoenix*, 136 Ariz. 601, 603, 667 P.2d 1316, 1319 (1983).

¶11 Here, we consider whether 3-F raised a genuine issue of material fact as to whether its conduct satisfied the duty to conform to the recognized standard of care while excavating around power lines. The District's general manager testified at his deposition that, in his opinion, what had been "done improperly about this excavation" was that it had been "left open." He acknowledged, however, that when an excavation has exposed electrical lines, they may either be "covered up or shored up." In his sworn declaration, 3-F Vice President Miller responded that 3-F had "shored the area per industry standards."

¶12 The District offered no evidence to rebut this testimony. Rather, the District argues Miller's declaration fails to set forth specific facts to support 3-F's defense and is, therefore, insufficient to withstand summary judgment. But, the District did not object to the declaration on that particular basis before the trial court. Nor did the District move to strike the declaration for 3-F's failure to comply with Rule 56(e), Ariz. R. Civ. P. Had the District done so, the trial court could have allowed 3-F a chance to cure any deficiencies. *See Johnson v. Svidergol*, 157 Ariz. 333, 335, 757 P.2d 609, 611 (App. 1988) ("Deficiencies in supporting documents attached to summary judgment pleadings can be waived."); *accord Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 26, 158 P.3d 232, 241 (App. 2007).

¶13 Even assuming the District did not waive its objection to the declaration, Miller's declaration was sufficient to withstand summary judgment on the District's negligence claim against 3-F. We find *Easter v. Percy*, 168 Ariz. 46, 810 P.2d 1053 (App. 1991), instructive. There, a construction worker who had been injured by a piece of rebar that had come loose from a support structure filed suit against the site inspector for negligence. *Id.* at 47-48, 810 P.2d at 1054-55. The defendant presented unrebutted expert testimony that he had made a general determination that enough rebar had been used, that the rebar was appropriately spaced and tied, and that this conduct met the standard of care for construction inspectors. *Id.* at 48, 810 P.2d at 1055. Notwithstanding the somewhat conclusory nature of that testimony, we concluded it was sufficient to withstand summary judgment on the question of whether the inspector had met the relevant standard of care. *Id.* at 49-50, 810 P.2d at 1056-57.

¶14 Here, Miller set forth in his declaration facts about the standard of care based on his "personal knowledge" that are at least as specific as those in *Easter*. Miller stated that, *inter alia*, "3-F followed the direction of Lake and followed all industry standards and specifications during the excavation including shoring the area properly," that "[t]he shoring had to be moved down the trench line, for safety reasons," that 3-F dug around and underneath the power lines by hand so as not to strike or damage them, and that "when 3-F finished for the day 3-F shored the area per industry standards but did not know it was to rain overnight."

¶15 Arizona courts generally have found affidavits insufficient under Rule 56(e) only when the affiants have not set forth facts that support their statements of the law. *See, e.g.*, *Florez v. Sargeant*, 185 Ariz. 521, 524, 526-27, 917 P.2d 250, 253, 255-56 (1996) (psychologists' affidavits stating abuse victims were of "unsound mind" under statute tolling limitations period without relevant supporting facts were insufficient to raise triable issue of fact); *Feuchter v. Bazurto*, 22 Ariz. App. 427, 429, 528 P.2d 178, 180 (1974) (appellant's statement in affidavit that appellee had obtained foreign judgment "by fraud or collusion or both" with no supporting facts insufficient to defeat summary judgment); *Maricopa County v. Biaett*, 21 Ariz. App. 286, 288, 290, 518 P.2d 1003, 1005, 1007 (1974) (board member's statement in affidavit that attorney fees were "unreasonable" with no supporting facts insufficient to withstand summary judgment motion). Because Miller's declaration contained more than mere conclusions of law but set forth specific facts to support 3-F's opposition to summary judgment, we conclude it was sufficient to show "that there is a genuine issue for trial." Ariz. R. Civ. P. 56(e).

¶16 Therefore, although the District suggested that 3-F may have breached the standard of care by leaving the trench open, it acknowledged that an excavator could comply with the relevant standard of care while leaving the trench open, and it presented no evidence that 3-F had failed to take the necessary precautions for leaving an open trench. Far from justifying a motion for summary judgment in plaintiff's favor, the pertinent record before us suggests that, had 3-F filed a cross-motion for summary judgment, that judgment should have been granted. *See Easter*, 168 Ariz. at 50, 810 P.2d at 1057 (unrebutted expert

testimony that conduct met standard of care for construction industry sufficient to justify grant of summary judgment in favor of defendant). And, when there is no evidence specifying how a defendant breached its duty, we cannot simply presume negligence "from the mere fact that an accident has occurred or that an injury has been sustained." *Nieman v. Jacobs*, 87 Ariz. 44, 47, 347 P.2d 702, 704 (1959). At a minimum, there exists a genuine issue of material fact that should have been left to the trier of fact, precluding the entry of summary judgment.

¶17 Relying on a foreseeability analysis, the District contends "the trial court correctly concluded that, based on the undisputed facts, 3-F could have foreseen the risk that its excavated pit could collapse and damage [the District]'s lines." It contends this finding established 3-F was liable, relying on *Donnelly Construction Co. v. Oberg/Hunt/Gilleland*, 139 Ariz. 184, 187, 677 P.2d 1292, 1295 (1984), in which the supreme court used a foreseeability analysis to assess duty in a negligence case. But, as we previously discussed, duty is only one element of a prima facie case of negligence, and its existence is not disputed here. Furthermore, our supreme court has, since *Donnelly*, expressly rejected the foreseeability-of-injury analysis in determining whether a duty exists. *Gipson*, 214 Ariz. 141, ¶ 15, 150 P.3d at 231. Moreover, in *Gipson* the court clarified that, although foreseeability remains a relevant factor in analyzing whether a defendant has breached its duty or proximately caused the injury, "[s]uch factual inquiries are reserved for the jury." *Id.* ¶ 16; *see also Hutto v. Francisco*, 210 Ariz. 88, ¶ 17, 107 P.3d 934, 937 (App. 2005) (whether risk of harm unreasonable is jury question); *Hill v. Safford Unified*

Sch. Dist., 191 Ariz. 110, 113, 952 P.2d 754, 757 (App. 1997) ("Ordinarily, it is a jury's function as fact finder to determine whether a risk of harm created by a defendant was foreseeable and unreasonable.").

¶18 Based on the evidence presented, we find the trial court erred in concluding reasonable people could not accept 3-F's defense that it had complied with the industry standards and thus, had taken adequate precautions to prevent the trench from collapsing. Consequently, the issue of whether 3-F breached its duty to the District should have been presented to a jury, and the trial court erred by granting summary judgment against 3-F.

COMPARATIVE FAULT

¶19 3-F contends the trial court erred by finding only 3-F liable, without considering the comparative fault of the other defendants. Although we have reversed summary judgment in favor of the District on another ground, we conclude the trial court also erred in granting that judgment when 3-F raised a genuine issue of material fact about the other defendants' comparative negligence. Unless there are no disputed issues of material fact, under the Arizona Constitution, the court may not direct summary judgment on a question of comparative negligence but must allow it to be decided by the jury. Ariz. Const. art. XVIII, § 5; A.R.S. § 12-2505(A); *Gunnell v. Ariz. Pub. Serv. Co.*, 202 Ariz. 388, ¶ 22, 46 P.3d 399, 405 (2002); *see also Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 359, 706 P.2d 364, 371 (1985) ("A contributory negligence issue cannot be taken from the jury by the simple expedient of calling it an issue of causation.").

¶20 Here, the trial court ordered that any judgment against the remaining defendants, Sonoran or Silver Fern, would not affect the damage award against 3-F—presumably suggesting that Sonoran or Silver Fern could only be jointly and severally liable for 3-F's negligent actions. That apportionment of damages would be legally correct if those defendants could only be vicariously responsible for the alleged harm to the District. *See* A.R.S. § 12-2506(D)(2) (joint liability abolished in Arizona except when, *inter alia*, entity at fault "was acting as an agent or servant" of other entity); *Wiggs v. City of Phoenix*, 198 Ariz. 367, ¶ 13, 10 P.3d 625, 629 (2000) ("Those whose liability is only vicarious have no fault to allocate."); *but see Natseway v. City of Tempe*, 184 Ariz. 374, 376, 909 P.2d 441, 443 (App. 1995) (noting "strong tendency" in Arizona "to apply comparative fault principles regardless of the relationship between the parties and the nature of the duty owed").

¶21 But 3-F alleged comparative negligence in its answer, in its initial disclosure statement, and in its response to the District's motion for partial summary judgment. Moreover, as discussed, 3-F filed a declaration contending that Silver Fern and Sonoran had taken direct actions at the excavation site that had contributed to the nature and location of any negligent digging. Thus, regardless of whether Sonoran and Silver Fern may also have been vicariously liable for 3-F's actions, 3-F sufficiently supported its contention that they had been comparatively negligent to withstand summary judgment on that issue. *See Beach v. City of Phoenix*, 136 Ariz. 601, 604, 667 P.2d 1316, 1320 (1983) (in negligence action where pedestrian injured when struck by vehicle, evidence of obvious obstruction in

sidewalk raised possible defense of contributory negligence sufficient to preclude entry of summary judgment in favor of defendant); *Tobel v. State*, 189 Ariz. 168, 170, 174, 939 P.2d 801, 803, 807 (App. 1997) (claim that plaintiff failed to look before stepping into road raised defense of contributory negligence, precluding summary judgment).[2]

¶22 For the foregoing reasons, we reverse the grant of summary judgment against 3-F and remand the case to the trial court.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

_____
PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge

[2]In light of our disposition of the case, we need not address 3-F's argument that the trial court erred in concluding it was responsible for the entire amount of the District's damages.